In the Supreme Court of the United States.

OCTOBER TERM, 1905.

IN RE JAMES LINCOLN, PETITIONER. No. 21, original.

APPLICATION FOR A WRIT OF HABEAS CORPUS.

BRIEF OF UNITED STATES FOR RESPONDENT.

STATEMENT.

The facts of this case are set forth in the stipulation accompanying the petition (pp. 24–26 of print), which states:

> It is hereby stipulated and agreed by and between the parties hereto, that the defendant is and was, on August 26, 1905, an allottee of lands granted to him on the Winnebago Reservation in Thurston County, Nebraska, said allotment having been made to him under the provisions of the act of Congress of February 8, 1887, and known as the General Allotment Act. That said allotment was made to him and the first patent therefor issued to him in December, 1893, and that the trust limitation has not yet expired, the title to said allotted land still being held in trust by the Government.

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That said James Lincoln, defendant, was indicted for introducing liquor into the Indian country, to wit, the Winnebago Reservation in Thurston County, Nebraska, said indictment being found under the provisions of the act of Congress of January 30, 1897 (29 Statutes at Large, page 506). That on August 26, 1905, the defendant had procured, at a point outside of the said Winnebago Reservation, certain whiskey which he was taking, and did take, within and upon said reservation, with the intention of taking it to his home, which was upon another allotment than his own, but the title to which allotment was still held in trust by the Government, and it was his intention there to use and drink said whiskey.

That said Winnebago Reservation had been allotted practically in whole, and that many of the allotments of deceased Winnebago Indians have been sold under the provisions of the act of Congress of May 27, 1902 (32 Stat. at Large, 245, 275). That there are within the original boundary limits of the Winnebago Reservation, in Thurston County, Nebraska, lands that have been sold and deeded to white people and the title thereto has passed out of both the Indian and the United States Government.

That all of the Winnebago Indians who were born and living at the time of allotment in the year 1888 received allotments under the provisions of the act of February 8, 1887, or of some previous act or treaty.

That the Winnebago Reservation is within an organized county of the State of Nebraska,

known as Thurston County, and that the Winnebago Indians exercise all the rights of citizenship and take part in the county government extending over the said Winnebago Reservation, some of them holding offices under the county government as county commissioners, justices of the peace, constables, road overseers, election officers, and jurors in the county and district courts of the State of Nebraska.

It is further stipulated that only a few of them have taken out naturalization papers under any act of Congress and that the defendant has not done so.

It does not appear from this stipulation upon what part of the reservation the liquor was actually introduced. I am advised, however, by the United States attorney, and I presume counsel for respondent will so admit, that Lincoln went upon and across trust allotments with the liquor in his possession, having been arrested on a road upon the reservation between lands sold to a white man and trust lands, after having traversed such allotments. The stipulation was intended to present a case as to the jurisdiction of the Federal Government over allotments still held in trust by the United States.

The act of January 30, 1897, under the provisions of which the indictment was found, provides (29 Stat., 506):

> That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, ex-

tract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, *and any person who shall introduce, or attempt to introduce, any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government,* or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: *Provided, however,* That the person convicted shall be committed until fine and costs are paid.

Petitioner was convicted and sentenced to pay a fine of $100 and costs of prosecution, and to be imprisoned in the county jail for sixty days, and until said fine and costs were paid.

ARGUMENT.

I.

At the outset I desire to say that the Government in no way intends to controvert the decision of this court in the *Matter of Heff* (197 U. S., 488), that an Indian who has received an allotment and trust patent under the act of February 8, 1887, is a citizen of the United States and subject to the jurisdiction of the State in matters of police.

We base our claim for the jurisdiction of the United States in this case, not upon any supposed authority over the Indian, as such, but upon its jurisdiction over the lands in question.

We contend that the lands in the Winnebago Reservation, allotted and unallotted, so long as the title to the same remains in trust in the United States, may be protected by the Government against trespass and intrusion, and that it is within the competency of Congress, as it has done in the act of January 30, 1897, to make it an offense against the United States to introduce liquor therein.

The lands in question were originally a part of the Omaha Reservation, but were purchased from the Omahas by a treaty concluded March 6, 1865 (Revision of Indian Treaties, 1873, p. 569), and set apart for the use of the Winnebagos by a treaty concluded with the latter tribe March 8, 1865 (id., 1014).

The lands originally occupied by the Omahas, including those in question, were not excluded by any act or treaty from the jurisdiction of the State of Nebraska; consequently upon its admission they became a part of the territory of the State and embraced within its jurisdiction.

Langford v. *Monteith*, 102 U. S., 145, 147.
United States v. *McBratney*, 104 U. S., 621, 623.
Fort Leavenworth R. R. Co. v. *Lowe*, 114 U. S., 525.
Utah & Northern Railway v. *Fisher*, 116 U. S., 28.

But while this is so, it is equally well settled—and the cases cited recognize the fact—that the jurisdiction of the State over lands of the United States within its limits is subordinate to the jurisdiction of the United States to protect its property and administer its institutions, and can not be so exercised as to interfere with the constitutional authority of the Federal Government.

An examination of the cases cited will show that all this court has ever held was that the State had jurisdiction of individuals or the property of individuals or corporations on lands of the United States so situated. It has held that the State could tax the property of corporations on such lands (*Fort Leavenworth R. R. Co.* v. *Lowe* and *Utah & Northern Railway* v. *Fisher*, *supra*), and that the State had jurisdiction of crimes committed by white men upon white men thereon (*United States* v. *McBratney*, *supra*). But it has never held that the State could tax the lands themselves or interfere with the control of the United States over them.

On the contrary, this court has distinctly held that the lands of the United States within a State are not subject to taxation by the State (*Van Brocklin* v. *State of Tennessee*, 117 U. S., 151, 155), and that the power vested by the Constitution in Congress, "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" (Art. IV, sec. 3) "*implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise.*" (*Railroad Co.* v. *Price County*, 133 U. S., 496, 504.)

In *United States* v. *Rickert* (188 U. S., 432, 438, 439), the cases just referred to were cited in support of the judgment of the court that lands allotted to Indians in pursuance of the act of February 8, 1887, as well as the permanent improvements thereon and personal property issued to the Indians by the United States, could not be taxed by the State while the title to such allotments was held in trust by the United States.

I do not understand that the decision of the court in the Heff case in anywise impairs the judgment in the Rickert case in this respect. (See *Matter of Heff*, 197 U. S., 509.) That being so, it must be regarded as settled that Indian allotments, while the title to the same is held in trust by the Government, are in the same position, so far as respects State interference with the control of the United States over them, as other public lands of the United States.

II.

What is the situation as to other public lands of the United States within the States?

In *Gibson* v. *Chouteau* (13 Wall., 92), the court, speaking by Mr. Justice Field, said (p. 99):

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. *That power is subject to no limitations.* Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise.

In *Jourdan* v. *Barrett* (4 How., 168), the court said (p. 184):

> By the Constitution Congress is given "power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States;" for the disposal of the public lands, therefore, in the new States, where such lands lie, Congress may provide by law; and having the constitutional power to pass the law, it is supreme; *so Congress may prohibit and punish trespassers on the public lands.*

Congress has made it an offense against the United States to cut timber on the public lands. (Revised Statutes, sec. 2461; id., sec. 5388, as amended by act of June 4, 1888.) The latter section, as amended, covers the cutting or destruction of "any timber stand-

ing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation, or other lands belonging to or occupied by any tribe of Indians under the authority of the United States."

Provisions for the protection of trees, fences, etc., on lands of the United States, and for the protection of such lands from trespass by cattle, etc., and prescribing penalties for violations thereof, are contained in the act of March 3, 1875, chapter 151. (18 Stat., 481.)

In *Camfield* v. *United States* (167 U. S., 518), the police power of the United States over the public lands in the States was expressly asserted. That case involved the constitutionality of the act of Congress of February 25, 1885, chapter 149, entitled "An act to prevent unlawful occupancy of the public lands." In upholding the act, the court, speaking by Mr. Justice Brown, said (pp. 525–526):

> The General Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all inclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage. The

> inconvenience—or even damage—to the individual proprietor does not authorize an act which is in its nature a purpresture of Government lands. While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of State legislation.

It is manifest, therefore, that even where lands or other property of the United States are within the jurisdiction of the State the rights of the Federal Government in regard thereto are very different from those of the ordinary proprietor. For a trespass upon his property the individual is relegated to a civil action, and must look to the State for police protection. But the United States is not dependent upon the State governments for such protection. This court has held it "to be an incontrovertible principle that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it." (*Ex parte Siebold*, 100 U. S., 371, 394.)

In that case the court, after stating the principle just quoted, said:

> This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both can not be executed at the same time. In that case the words of the Constitution itself show which is to yield. "This Constitution and all laws which shall be made in pursuance thereof * * * shall be the supreme law of the land."

To the same effect are *In re Neagle* (135 U. S., 1); *In re Debs* (158 U. S., 564). See also *Ohio* v. *Thomas* (173 U. S., 276), in which it was held that the State could not, in the exercise of its police powers, interfere with the administration of a national soldiers' home within its limits and general jurisdiction.

It is clearly, therefore, within the competency of Congress to forbid and punish trespasses upon the lands of the United States within the limits and jurisdiction of the State.

It is equally manifest that it is for Congress to determine what shall constitute a trespass—what shall be permitted to be taken upon said lands and what shall be excluded therefrom.

There is nothing to differentiate the public lands in Nebraska from those in other States, so far as concerns the control of the Federal Government over them.

The act enabling the people of Nebraska to form a constitution and State government, approved April 19, 1864 (13 Stat., 47), provided (sec. 4):

> That said constitution shall provide, by an article forever irrevocable, without the consent of the Congress of the United States:
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> * * * * *
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> Third. That the people inhabiting said Territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said Territory, and that the same shall be and remain at the sole and entire disposition of the United States, and that the lands belonging to citizens of the United States residing without the said State shall never be taxed higher than the land belonging to residents thereof, and that no taxes shall be imposed by said State on lands or property therein belonging to or which may hereafter be purchased by the United States.

The constitution adopted by the people of Nebraska provided, Article XI (Gen. Stat. Nebr., 1873, p. 66):

> SEC. 6. This constitution is formed, and the State of Nebraska asks to be admitted into the Union on an equal footing with the original States on the condition and faith of the terms of the propositions stated and specified in an act of Congress approved April nineteenth, 1864, authorizing the people of the Territory to form a constitution and State government, the people of the State of Nebraska hereby accepting the conditions in said act specified.

Provisions of this sort in admission acts are inserted merely out of abundant caution, to avoid disputes, as the constitutional rights of the Federal Government over its lands and other property in the States would be the same without them.

III.

If the lands upon the Winnebago Reservation, in the respects mentioned, are in the same category as other public lands of the United States, the authority of the Federal Government to prohibit and punish the introduction of liquor thereon is unquestioned. That, so long as the title thereto is held in trust by the Government they are in practically the same position as other public lands, is clear. They can not be taxed by the State during the trust period, as this court held in the Rickert case, because the tax would be in effect upon the property of the United States. Not until the legal title passes out of the United States do they cease to be the property of the United States or pass beyond its control.

The fee to the lands of the Indian tribes has always been in the Government, subject only to the Indians' right of occupancy.

> *Johnson* v. *McIntosh*, 8 Wheat., 543, 588.
> *Beecher* v. *Wetherby*, 95 U. S., 517, 525–526.
> *Spalding* v. *Chandler*, 160 U. S., 402–3.

In *Beecher* v. *Wetherby* the court said (p. 525):

> But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could

be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; *that occupancy could only be interfered with or determined by the United States.* It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. *Be that as it may, the propriety or justice of their action toward the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians.* The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the Government. It was so ruled in *Johnson* v. *McIntosh* (8 Wheat., 543) in 1823, and in *United States* v. *Cook* (19 Wall., 591) in 1873. Other cases between those periods have affirmed the same doctrine. (*Clark* v. *Smith*, 13 Pet., 195. See also *Jackson* v. *Hudson*, 3 Johns. (N. Y.), 375; *Veeder et al.* v. *Guppy*, 3 Wis., 502, and 8 Opin. Atty. Gen., pp. 262–264.) In *United States* v. *Cook* the United States maintained replevin for timber cut and sold by Indians on land reserved to them, the court observing that the fee was in the United States, and only a right of occupancy in the Indians; that this was the title by which other Indians held their land, and that the authority of *Johnson* v. *McIntosh* on this point had never been doubted.

It is unnecessary to do more than refer to the many instances in which Congress has exercised its plenary power over the Indian lands by removing the tribes located thereon, thus destroying their right of occupancy.

The fact of the allotment of such lands under the act of February 8, 1887, and the issuance of a trust patent therefor, does not divest the United States of the fee; consequently it still has proprietary control over them. Referring to section 5 of that act, which authorized the issuance of trust patents to allottees, the court in the Rickert case said (188 U. S., 436):

> The word "patents," where it is first used in this section, was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express. The "patents" here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing, designed to show that for a period of twenty-five years the United States would hold the land allotted in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and subsequently, at the expiration of that period—unless the time was extended by the President—convey the fee, discharged of the trust and free of all charge or incumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee.

> This interpretation of the statute is in harmony with the explicit declaration that any conveyance of the land, or any contract touching the same, while the United States held the title in trust, should be absolutely null and void. So that the United States retained its hold on the land allotted for the period of twenty-five years after the allotment, and as much longer as the President, in his discretion, should determine.

The Winnebagos hold their allotments under trust patents issued under the act of February 8, 1887. There were a number of allotments made and patents issued under the act of February 21, 1863 (12 Stat., 658). But those patents were subsequently surrendered for new patents under the act of 1887.

In *Shiver* v. *United States* (159 U. S., 491) this court held that lands duly entered by a citizen for a homestead under the laws of the United States were not, pending proceedings in the land department, so segregated from the public domain as to be no longer lands of the United States within the meaning of section 2461, Revised Statutes, but continued to be the property of the United States for five years following the entry and until a patent was issued; and that while the entryman might cut such timber as was necessary for cultivation, building purposes, etc., if he exceeded his rights he was liable to prosecution, under sections 2461 and 2488, Revised Statutes.

In that case, after referring to certain prior decisions, the court, speaking by Mr. Justice Brown, said (p. 495):

> While these cases indicate that lands once appropriated to a certain purpose thereby cease to be available for another purpose, there is nothing in them to show that the United States loses its title to such lands by the first appropriation or that they cease to be the property of the Government. Upon the contrary, it was said by this court, as early as 1839, in *Wilcox* v. *Jackson* (13 Pet., 498, 516), that, "with the exception of a few cases, nothing but the patent passes a perfect and consummate title." So, in *Frisbie* v. *Whitney* (9 Wall., 187, 193).

The court drew a parallel between the case of any entryman and that of Indians upon a reservation, observing (p. 498):

> While this question never seems to have arisen in this court before, in *United States* v. *Cook* (19 Wall., 591)—a suit in trover for the value of timber cut from an Indian reservation—it was held that while the right of use and occupancy by the Indians was unlimited, their right to cut and sell timber, except for actual use upon the premises, was restricted to such as was cut for the purpose of clearing the land for agricultural purposes; that while they were at liberty to sell the timber so cut for the purpose of cultivation, they could not cut it for the purpose of sale alone. In other words, if the cutting of the timber was the principal and not the incident, then the cutting would be unlawful, and the timber, when cut, became the absolute property of the United

States. Their position was said to be analogous to that of a tenant for life, the Government holding the title, with the rights of a remainder-man.

The same views were reaffirmed in *Stone* v. *United States* (167 U. S., 178, 191, 194).

Allotment in severalty, so long as the title to the allotment remains in the Government, does not change the nature of the Indian's right, except that it gives him a right in severalty to the occupancy of a particular section of the lands set apart for the use of his tribe, where before he had a right in common with the other members of the tribe to the occupancy of the whole tract.

The fact that there are within the limits of the Winnebago Reservation lands which have been sold and deeded to white people, under the act of Congress of May 27, 1902 (32 Stat., 245, 275), authorizing the sale and conveyance in fee of inherited Indian lands, manifestly does not affect the power of Congress to protect the lands to which it still retains the fee.

The introduction of liquor on these allotments is not only a menace to the Indians themselves, but, as has been the experience of all communities, tends to diminish the value of such lands. But even if it were otherwise, it is, as already stated, for the Government itself to determine what shall constitute a trespass upon its property. The language of the court in *Camfield* v. *United States* (167 U. S. 513), above quoted, indicates the broad discretion which the General Government has

in this respect. The court there says that the power of the United States to protect its lands is to be "measured by the exigencies of the particular case," and may be exercised for the benefit of the public or of intending settlers, even at the cost of inconvenience or damage to individuals. The fact, therefore, that the exclusion of liquor from Indian allotments may be for the ultimate benefit of the allottees can not invalidate this exercise of the Federal police power.

The application for a writ of habeas corpus should therefore be denied.

HENRY M. HOYT,
Solicitor-General.

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